IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 12, 2009 Session

MARK BRADLEY v. ALL AMERICAN CLASSICS OF TENNESSEE, INC., D/B/A CLASSIC CARS SOUTHEAST

Appeal from the Circuit Court for Wilson County
No. 14972 John D. Wootten, Jr., Judge

No. M2008-01738-COA-R3-CV - Filed April 16, 2009

Buyer purchased a car from seller. Buyer never examined the car but relied upon seller's web site, representations and pictures. The car was not what it was represented to be, and seller would not take it back and return the purchase price. Buyer sued based on fraud and the Tennessee Consumer Protection Act. After buyer's proof, seller moved for a directed verdict, which the trial court granted because buyer did not inspect the car before the purchase. We reverse.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Steve North, Madison, Tennessee, for the appellant, Mark Bradley.

Shawn Joseph McBrien, Lebanon, Tennessee, for the appellee, All American Classics of Tennessee, Inc., d/b/a Classic Cars Southeast.

OPINION

This case arises out of the purchase of a 1968 Dodge Charger by Mark Bradley, the plaintiff, from All American Classics of Tennessee, Inc., the defendant. Mark Bradley is a native of the United Kingdom. His employer transferred him to San Carlos, California. Bradley wanted to buy a 1968 Dodge Charger.[1] He found the following advertisement on the web site of All American Classics of Tennessee:

---

[1]The Dodge Charger was restyled in 1968. It was a very popular "muscle car" and was even featured in the classic movie *Bullitt* starring Steve McQueen. The 1969 Charger looked very similar to the 1968 model. The most famous 1969 Dodge Charger is the "General Lee" of the *Dukes of Hazzard* television series.

1968 Dodge Charger
Exterior: Green Metallic
Interior: Black
Engine: 8 Cylinder
Transmission: Automatic
Stock #
Price: $38,900.00
Other Info:
You are looking at a rare 1968 Dodge Charger 383 4 barrel H Code car (383 High Performance engine with 330 hp). This vehicle is all original, numbers matching, with factory air conditioning. The engine and 727 Torque Flight automatic transmission have been completely rebuilt and the car was recently repainted its code color correct. The door jams and underhood have been painted correctly as you will note in the pics. The rear is a 323 sure grip and is fairly original. Floor pans and trunk floor are original and the car is straight and rust free. The black vinyl top is new and the interior is all original. All the brakes have been rebuilt and operate properly. Additionally, the vehicle has power steering and power brakes and is all stock under the hood - she's in need of nothing but a good home!!

Call today for more details . . . .

Bradley's initial e-mail was not answered, so he called the dealer and spoke with Ms. Ryan and Mr. Jenkins. Ryan said that the car "needed nothing." Jenkins told him that the engine was "mechanically perfect" and had been rebuilt approximately a year ago. Ryan sent him more pictures.

Bradley agreed to purchase the car for $36,000.00. The vehicle arrived in California on Thursday, May 3, 2007. The transporter had damaged a fender. Upon driving the car, Bradley noticed that the engine wasn't running smoothly and the transmission was shifting "forcibly." He also noticed some rust on the car. On the following Monday, Bradley took the car to a body shop for an estimate on the damage the transporter caused. Then he took the car to A & E Automotive and asked Frank Alaimo to examine it. They took a test drive and the car broke down almost immediately. At this point, Bradley asked Alaimo to perform an inspection of the vehicle.

Friday of that week, Alaimo gave Bradley a report on the 1968 Dodge Charger. The report stated:

> Upon initial inspection of this automobile, I found so many things wrong with this car that I could not believe someone had the nerve to sell this car for the money they were asking. Inspection points are as follows:
>
> 1 Under Body: Under body was completely rusted out! Right rear quarter panel was reconstructed from fiber glass and body filler (Bondo)! The under body

was also under coated and there was so much rust that it did not stick and is hanging from the rust under the car!

2 Brakes: The brakes need to be rebuilt; the lining is cracked front and rear. The hydraulic wheel cylinders are all leaking brake fluid and need to be replaced, and the brake system needs to be completely rebuilt.

3 Engine: The engine is missing and we gave it a compression test. The Number 1 and 6 cylinders were low on compression and the spark plugs were oil fouled and the rest of the other cylinders were also below limits. The engine needs to be over hauled for sure.
The only thing that was done was the upper part of the engine was detailed to make it look good. The AC compressor froze up and broke the fan belt when I road tested the car and it did so within the first 100 feet of the road test. We came back to the shop right away.

4 Transmission: Returning to the shop from road test I noted that the transmission was not shifting properly and was slipping in gear. This is a sign that the transmission is in need of over haul.

5 General Overview: The [g]eneral overview of this automobile is that it was a worn out rust bucket that had superficial cosmetic enhancement done to make the car appear that it was in good condition. Ha Ha. Everywhere I look, this car needs attention.

In summary, it would take a very large amount of money to get this car even close to being in good, usable condition. The biggest drawback is that the body needs to be discarded and another found to replace it. This would take away any claim that this car is a "matching number" car.

The following Monday, Bradley called Ryan and told her the problems he had. He asked that All American Classics collect the car and return his money. She refused.

Bradley filed suit against All American Classics of Tennessee on June 28, 2007, seeking a rescission of the contract and monetary damages based on fraud and Tennessee Consumer Protection Act ("TCPA") violations. At trial, Bradley testified in person and Alaimo, by deposition. In addition to the above facts, both Bradley and Alaimo testified that most of these defects were obvious. After the plaintiff rested, the defendant moved for a directed verdict, which the trial judge granted. In his written order, the trial judge stated:

> [T]his Court notes as a matter of law that each party to a contract or agreement is bound to disclose to the other party all he or she may know respecting the subject matter materially affecting a correct view of it unless common observation would

> have furnished the information. Common observation in this case would have eliminated this cause of action. Even viewed in the light most favorable to the plaintiff, this Court finds that no reasonable or rational trier of fact could come to the conclusion that a violation of the Tennessee Consumer Protection Act has occurred or that there was misrepresentation as alleged in the complaint. This conclusion is buttressed and supported by the plaintiff's own expert witness. The plaintiff himself acknowledged that the defects were obvious. To find for the plaintiff or find in the contrary in this case would submit any business to a higher standard of eliminating a buyer's inconvenience.

Bradley appealed.[2]

Standard of Review

The disposition of a motion for directed verdict involves a question of law, so the appellate courts review the trial court's decision de novo, without a presumption of correctness. *Duran v. Hyundai Motor America, Inc*, 271 S.W.3d 178, 206 (Tenn. Ct. App. 2008). "In reviewing whether a trial court properly granted a motion for a directed verdict, we must 'take the strongest legitimate view of the evidence favoring the opponent of the motion.'" *Garcia v. Norfolk Southern Ry. Co.*, 266 S.W.3d 917, 922-23 (Tenn. Ct. App. 2008) (quoting *Alexander v. Armentrout*, 24 S.W.3d 267, 271 (Tenn. 2000) . "If reasonable minds could differ as to the conclusions to be drawn from the evidence presented, the motion must not be granted, and, if it was granted, the trial court's ruling must be reversed on appeal." *Id*. at 923.

Analysis

Fraud

The basic elements of a fraud claim are: "(1) an intentional misrepresentation with regard to a material fact; (2) knowledge of the representation falsity - that the representation was made "knowingly" or "without belief in its truth," or "recklessly" without regard to its truth or falsity; (3) that the plaintiff reasonably relied on the misrepresentation and suffered damage; and (4) that the

---

[2] We note that both parties briefed the issue of breach of contract. The complaint, however, mentions only fraud and the TCPA as theories of recovery. The trial court's order on the motion for a directed verdict notes:

> [T]he plaintiff in a pre-trial hearing indicated it was proceeding under the misrepresentation theory and the Tennessee Consumer Protection Act. The Court further notes that contained in the court file is the plaintiff's own verdict form which makes no reference to any finding by a jury of breach of contract. Nevertheless, this Court finds that if inasmuch as common observation by the plaintiff would have eliminated this cause of action under any theory it would likewise do so under a breach of contract theory.

We are unwilling to consider a theory of recovery that has not been pled, was not invoked by the plaintiff in the pre-trial hearing, and was not referenced in the plaintiff's own verdict form.

misrepresentation relates to an existing or past fact." *Murvin v. Cofer*, 968 S.W.2d 304, 310 (Tenn. Ct. App.1997) (quoting *Stacks v. Saunders*, 812 S.W.2d 587, 592 (Tenn. Ct. App. 1990) (citations omitted)).

The defendant attacks Bradley's reliance as unreasonable. It rightly maintains that Bradley has the burden of showing that his reliance on the representations was reasonable. *Metro. Gov't of Nashville & Davidson County v. McKinney*, 852 S.W.2d 233, 237 (Tenn. Ct. App. 1992). Bradley testified about his decision to do business with All American Classics:

> I thought this was a reputable, honest, and trustworthy dealership that I could do business with. And they had a very attractive Web site. They had a large stock of vehicles. They all looked in pristine, very good condition.
>
> And Dale Nunnery had a letter at the back saying, how, you know, he valued customers[,] that his staff were - - you know, had integrity. And, you know, this - - you know, this is how they did business. So that gave me confidence that I was dealing with a good company. A company I could trust.

Bradley also admitted that he did not come to Lebanon to inspect the car because "[i]t was inconvenient because of the distance." When asked about hiring someone to inspect the car in Lebanon before the purchase, he admitted, "with hindsight, it would have been prudent to possibly have someone inspect this car."

Alaimo testified that he had done many presale inspections of vehicles: "As in any type of business transaction where there's going to be a large amount of money exchanged, you always want to know what you're getting involved with. So I do a lot of that."

The trial court essentially found that, since the defects were obvious, Bradley or someone acting on his behalf would have found them in the course of an inspection. The failure to find them was Bradley's fault because he did not inspect the vehicle and, therefore, Bradley must bear the burden of his own folly.

On appeal, the defendant relies on the principle that it had "a duty to disclose . . . any material fact affecting the essence of the subject matter of the contract, unless ordinary diligence would have revealed the undisclosed fact." *Lonning v. Jim Walter Homes, Inc*., 725 S.W.2d 682, 685 (Tenn. Ct. App. 1986). This concept goes back almost 200 years in this state, to the time when Judge Overton wrote that it was "a sound principle of equity that each party to a contract is bound to disclose to the other all he may know respecting the subject-matter materially affecting a correct view of it, unless common observation would have furnished the information."[3] *Perkins v. McGavock*, 3 Tenn. 415, 417 (1813).

---

[3]The expression "common observation" used in *Perkins* has been construed to include the exercise of ordinary diligence. *Simmons v. Evans*, 206 S.W.2d 295, 296 (Tenn. 1947).

This equitable principle is based on the buyer's use of ordinary diligence or common observation. The rule has been further explained as follows:

> [W]here the means of information are at hand and equally accessible to both parties so that, with ordinary prudence or diligence, they might rely on their own judgment, generally they must be presumed to have done so, or, if they have not informed themselves, they must abide the consequences of their own inattention and carelessness. *Unless the representations are such as are calculated to lull the suspicions of a careful man into a complete reliance thereon*, it is commonly held, in the absence of special circumstances, that, where the means of knowledge are readily available, and the vendor or purchaser, as the case may be, has the opportunity by investigation or inspection to discover the truth with respect to matters concealed or misrepresented, without prevention or hindrance by the other party, of which opportunity he is or should be aware, and where he nevertheless fails to exercise that opportunity and to discover the truth, he cannot thereafter assail the validity of the contract for fraud, misrepresentation or concealment with respect to matters which should have been ascertained . . . .

Pakrul v. Barnes, 631 S.W.2d 436, 438 (Tenn. Ct. App. 1981) (quoting 91 C.J.S. *Vendor and Purchaser* § 68, 945-46) (emphasis added).

The defendant's entire argument on the directed verdict motion is that Bradley's reliance on the defendant's web site, representations and pictures was unreasonable and Bradley should have inspected the vehicle himself or had someone inspect it for him. The reasonableness of a party's reliance is a question of fact. *City State Bank v. Dean Witter Reynolds, Inc.*, 948 S.W.2d 729, 737 (Tenn. Ct. App. 1996). Factors relevant to the determination of the reasonableness of a plaintiff's reliance on a misrepresentation include (1) the plaintiff's business expertise and sophistication; (2) the existence of longstanding business or personal relationships between the parties; (3) the availability of the relevant information; (4) the existence of a fiduciary relationship; (5) the concealment of the fraud; (6) the opportunity to discover the fraud; (7) which party initiated the transaction; and (8) the specificity of the misrepresentation. *Id.*

Although Bradley had done some reading, he was not experienced in regard to vintage automobiles. He had no longstanding relationship, business, personal or fiduciary, with All American Classics of Tennessee. Bradley made the initial contact with the defendant. As for availability of information, Lebanon, Tennessee, and San Carlos, California, are approximately 2,000 miles apart. All American Classics possessed the car and controlled the flow of information through the pictures it sent to Bradley and the comments its employees made. Acquisition of information on Bradley's part would cost him more money and be inconvenient. The fraud was concealed by the use of camera angles (failure of the defendant's pictures to show the rust on one side of the car and holes in the muffler), by covering up obvious problems (using a red cloth to hide a large patch in the floor of the trunk, spraying undercoating over rust spots on the underside of the car), and with outright lies (representations that the engine and transmission were completely rebuilt, the car was

rust free, and the brakes had been rebuilt). Opportunity to discover the fraud was minimized by the defendant's efforts to hide obvious problems in the pictures and the distance between Bradley and the car.

From the facts of this case, one could certainly find that the representations and actions of All American Classics of Tennessee were "calculated to lull the suspicions of a careful man into a complete reliance thereon." *Pakrul,* 631 S.W.2d at 438. In our opinion, under these facts, it is too simplistic merely to say that Bradley should have examined the car or hired someone to inspect it. Our rules of conduct are based primarily on the face-to-face transaction, historically the most common mode of conducting commerce. That is why the opportunity to inspect is given such importance: even if the seller lies to the buyer, the buyer can view and examine what he is buying. In the last decade, the internet has revolutionized commerce. In this case prospective purchasers all over the world can look at All American Classics' web site. While it may be reasonable for a prospective buyer in Nashville, Charlotte, Jackson or even Memphis to make the pilgrimage to Lebanon to examine the car personally, it may not be reasonable for someone farther away to do so.

Ownership of a web site is not a license to lie. When considering the reasonableness of Bradley's reliance, we cannot lose sight of the representations All American Classics made and the actions it took to induce his reliance. All American Classics made a number of bold, unequivocal statements on its web site about the condition of the car body, the engine, the transmission and the brakes that, according to Bradley's proof, are false. The pictures sent to Bradley were taken in a way that would not reveal these and other problems. One cannot be permitted to fill a web site with misrepresentations designed to induce a buyer to purchase an item in reliance thereon and remain immune from liability based on the simple fact that the buyer did not inspect the item before purchase. The reasonableness of Bradley's reliance on All American Classics' misrepresentations must be determined objectively in light of the totality of the circumstances surrounding the transaction, including, but not limited to, whether All American Classics intended that Bradley rely upon its misrepresentations and act or not act in reliance on those representations. *See* 8 T.P.I. - Civil 8.36 (8th ed. 2008).

Given the evidence of the misrepresentations on the web site, the misrepresentations by employees of All American Classics, and the apparently intentional acts to conceal problems with the car in the pictures, we cannot say definitively that Bradley was unreasonable in relying on the misrepresentations and pictures. Consequently, we respectfully disagree with the trial court's grant of a directed verdict on Bradley's fraud allegation.

Tennessee Consumer Protection Act

Reliance upon a misrepresentation is not an element of a Tennessee Consumer Protection Act violation. *Messer Griesheim Indus., Inc., v. Cryotech of Kingsport, Inc*., 131 S.W.3d 457, 469 (Tenn. Ct. App. 2003). There must, however, be an unfair or deceptive act committed by the defendant before liability under the TCPA can be found. *Id*. Representing that goods have

characteristics that they do not have or representing that goods are of a particular standard or quality that they do not meet are unfair or deceptive acts or practices under the TCPA. *See* Tenn. Code Ann. § 47-18-104(b)(5) & (7).

To recover damages under the TCPA, the loss suffered must be as a result of the use of an unfair or deceptive act or practice. Tenn. Code Ann. § 47-18-109(a)(1). In other words, Bradley must show that the unfair or deceptive acts of All American Classics proximately caused his injuries. *White v. Early*, 211 S.W.3d 723, 741 (Tenn. Ct. App. 2006).

> A deceptive act or practice is one that causes or tends to cause a consumer to believe what is false or that misleads or tends to mislead a consumer as to a matter of fact. Thus, for the purposes of the TCPA and other little FTC acts, the essence of deception is misleading consumers by a merchant's statements, silence, or actions.

Tucker v. Sierra Builders, 180 S.W.3d 109, 116 (Tenn. Ct. App. 2005) (citing Jonathan Sheldon & Carolyn L. Carter, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 4.2.3.1, 118-19 (5th ed. 2001) (footnote omitted). Bradley has certainly made a prima facie case that the web site statements and other actions of the defendant are deceptive under the TCPA.

An act or practice is unfair under the TCPA if "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." *Id*. at 116-17 (quoting 15 U.S.C.A. § 45(n)). The defendant seizes upon the "not reasonably avoidable" language in *Tucker* to argue that Bradley "could have avoided this problem if he had inspected or had someone inspect the car." Yet, "[c]onsumers cannot reasonably avoid injury when a merchant's sales practices unreasonably create or take advantage of an obstacle to the free exercise of consumer decision-making." *Id*. at 117. Misrepresentations can constitute obstacles to "the free exercise of consumer decision-making." *Id*. Another such obstacle may be the use of the internet to place substantial distance between the misrepresenting seller and the deceived buyer. Bradley has made a prima facie case that the actions of the defendant are unfair under the TCPA.

Just as this court, on this record, was unwilling to find that Bradley unreasonably relied on the misrepresentations, we are unwilling to find that Bradley could have reasonably avoided the problem.[4]

Conclusion

We find that "reasonable minds could differ as to the conclusions to be drawn from the evidence presented . . . ." *Garcia,* 266 S.W.3d at 923. Therefore, we reverse the trial court's grant of a directed verdict as to fraud and the Tennessee Consumer Protection Act and remand this case

[4]The "reasonably avoidable" defense applies to unfair practices, not deceptive practices. *See Tucker*, 180 S.W.3d at 116-17.

for further proceedings consistent with this opinion. Costs of appeal are assessed against the appellee, All American Classics of Tennessee, Inc., for which execution may issue if necessary.

_____

ANDY D. BENNETT, JUDGE